

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-923

LYNN JORDAN and GERALD HYLAND,

Appellants,

v.

MILLS E. GODWIN, Governor of the
Commonwealth of Virginia, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

APPELLANTS' REPLY TO MOTION TO DISMISS OR
ALTERNATIVELY, FOR SUMMARY AFFIRMANCE

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Appellees' motion to dismiss or alternatively, for summary affirmance is incorrect on both asserted grounds:

1. Rule 11(3) of the Rules of this Court requires that the notice of appeal be filed "within the time allowed by law for taking such appeal". Under 28 U.S.C. § 2101(b), the time allowed for this appeal was 60 days from the date of judgment, or by November 8, 1976. Rule 4(a), F.R.A.P. provides that the district court may grant a 30-day extension "[u]pon a showing of excusable neglect". By order

dated December 3, 1976, the district court found that such a showing had been made—counsel, through no fault of his own, had only learned of the decision on November 30—and granted an extension until December 8. The notice of appeal was filed December 3.

Appellees cite no authority or justification for the proposition that the district court's power to grant the 30-day extension applies when the appeal is to the Court of Appeals but not when the appeal is directly to the Supreme Court. Several decisions of this Court, however, suggest by analogy that the power exists in a direct appeal situation as well. See, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, No. 74-895 (by not granting appellee's motion to dismiss, Court implied that the provisions in the Federal Rules tolling the time for filing notice of appeal applied in a direct appeal to this Court); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944) (timely motion to amend findings would toll the period for taking an appeal, where no tolling was specified in the review provisions); *United States v. Healy*, 376 U.S. 75 (1964) (timely petition for rehearing tolled the time for applying to the Supreme Court for certiorari in a criminal case, even though no rule specifically provided for such tolling).

2. Appellees' characterization of *Turner v. Fouche*, 396 U.S. 346 (1970), which they now address for the first time in this entire litigation (see, Juris. St. at 12), is wholly false. In *Turner*, this Court struck down the freeholder requirement for appointment to the school board *not* because it had been used to exclude blacks,¹ but *solely* because it

¹ As Part I of this Court's opinion in *Turner* makes clear, the allegations concerning exclusion of blacks related to other practices also challenged by plaintiffs in that case. *Id.* at 350 ("The complaint attacked those provisions as accounting for both the exclusion of Negroes and nonfreeholders from the board of education".)

flatly excluded *all* nonfreeholders, white or black. Indeed, the Court's opinion in *Turner* does not even mention any racial effects of the freeholder requirement. See, *id.* at 362-64.

Finally, appellants do *not* assert a right "to be appointed to public office", as appellees state (Motion to Dismiss at 4), but only the right, recognized by this Court, "to be considered for public service without the burden of invidiously discriminatory disqualifications [citation omitted]". 396 U.S. at 362. Whether this right is "fundamental" or not is the question which this Court expressly reserved in *Turner v. Fouche*. See, Juris. St. at 13-15.

Respectfully submitted,

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